

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNEAPOLIS CITY COUNCIL

In the Matter of the On-Sale Liquor  
License, Class A, with Sunday Sales  
held by Midwest Latino Entertainment &  
Talent, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Raymond R. Krause on January 25-26, 2010, and January 28-29, 2010, at the Office of Administrative Hearings in St. Paul, Minnesota. The hearing record remained open for the submission of posthearing briefs and one posthearing exhibit. The hearing record closed on February 16, 2010, with the receipt of the final brief.

Joel M. Fussy, Minneapolis Assistant City Attorney, 350 South Fifth Street, Suite 210, Minneapolis, Minnesota, 55415, appeared on behalf of the Division of Licenses and Consumer Services of the City of Minneapolis (City License Division). Boris Parker, Parker & Wenner, P.A., 220 South Sixth Street, 1700 U.S. Bank Plaza, Minneapolis, Minnesota, 55402-3707, appeared on behalf of Midwest Latino Entertainment & Talent, Inc. and Maya Lopez-Santamaria d/b/a El Nuevo Rodeo.

**STATEMENT OF THE ISSUE**

The issue presented in this case is whether good cause exists for the City of Minneapolis to revoke the On-Sale Class A Liquor License with Sunday Sales held by Midwest Latino Entertainment & Talent, Inc. and Maya Lopez-Santamaria for the establishment doing business as El Nuevo Rodeo located at 2709 East Lake Street in Minneapolis, Minnesota. The ALJ finds insufficient cause to revoke the license but finds sufficient cause for a lesser sanction.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

**Background**

1. Midwest Latino Entertainment & Talent, Inc. and Maya Lopez-Santamaria operate El Nuevo Rodeo (ENR), at 2709 Lake Street East, Minneapolis, Minnesota.

ENR sells alcohol under a Class A On-Sale Liquor License with Sunday Sales issued by the City of Minneapolis (City).<sup>1</sup>

2. ENR is an entertainment venue operated in conjunction with a restaurant located in the City's Third Police Precinct. ENR is located in a commercially-zoned Community Activity Center District (designated C3A). The business operates in the Oddfellows Building, adjacent to two other establishments that serve alcohol. The area surrounding ENR is zoned for industrial, commercial, and residential uses. ENR is located four blocks east of Hiawatha Avenue and a commuter light rail transit station. The immediate area on East Lake Street is predominantly zoned commercial. East Lake Street has significant volumes of vehicle and pedestrian traffic. The immediate neighborhood has many Latino-oriented restaurants and businesses. These businesses, including ENR, are of great importance to the Latino community.<sup>2</sup>

3. ENR is located in the Longfellow neighborhood (Longfellow) in Minneapolis. Longfellow has a significant problem with crime in the area, including reports of "shots fired," meaning the sound of gunfire is heard within the neighborhood. On average, gunfire is reported every week in Longfellow. Almost all of the gunshots in Longfellow are identified as occurring on the west side of Hiawatha Avenue, at least four blocks from ENR.<sup>3</sup> There has been an increase in the numbers of businesses along Lake Street, particularly in the immediate vicinity of ENR, since 2003. Overall, criminal activity in Longfellow, while still significant, is reduced from the levels experienced in 2003.<sup>4</sup>

### **ENR's Initial Licensure**

4. In 2003, Maya Lopez-Santamaria discussed with Hamoudi Sabri, the owner of the Oddfellows Building, the possibility of opening a restaurant. Mr. Sabri was developing the Oddfellows Building and he was seeking a tenant to replace the recently closed Vanandy's Nightclub, which had been the prior tenant in the space he was seeking to fill. At that time the City was discussing the possibility of creating an entertainment district at 28<sup>th</sup> and Lake to increase business activity and address the current economic blight affecting that neighborhood. The building was dilapidated and there was active prostitution going on in the immediate area. The area was considered a "bad part of town."<sup>5</sup>

5. On June 1, 2003, ENR applied for a Zoning Addendum for Beverage Alcohol License in Minneapolis to operate as a restaurant and nightclub with live entertainment in the City with a Class A Liquor License with Sunday Sales. The Zoning Addendum specifically approves the uses of the premises as consistent with the zoning classification of the property. Gross square footage of the premises is identified as

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<sup>1</sup> Ex. P318.

<sup>2</sup> Testimony of Ricardo Cervantes; Test. of Antonio Gaytan; Test. of Maya Lopez-Santamaria; Test. of Alejandro Rojas; Test. of Joyce Wisdom; Minneapolis Code of Ordinances § 520.160.

<sup>3</sup> Ex. R66A.

<sup>4</sup> Test. of R. Cervantes; Test. of Gary Schiff.

<sup>5</sup> Test. of M. Lopez-Santamaria.

16,000 square feet. Net square footage for seating areas on the second floor (main floor) is listed as 5,220 square feet.<sup>6</sup>

6. As part of its application for licensure, ENR submitted its Business Plan, describing in overall terms how the proposed business was intended to be run and setting out the manner in which restaurant operations, liquor sales, entertainment, and security would be handled. Included in the Business Plan was a comparison of ENR's proposed operation with other businesses in the same general area of operations. One of those businesses was the recently closed Vanandy's Nightclub, regarding which the Business Plan stated:

### **Vanandy's Night Club**

Vanandy's Nightclub, previously located at the same address as El Nuevo Rodeo and La Quebradita Restaurant, was closed in January 2003 due to code infringements and questionable business practices. For the purposes of market research, it is our primary business research tool because El Nuevo Rodeo and La Quebradita Restaurant is virtually taking over this pre-existing business and its market niche while consciously raising the bar for its customers in virtually every aspect of the business. For the sake of research, let us consider this past establishment's business at the same location.

#### *Positive market attributes:*

Vanandy's nightclub opened in approximately 1999. They were the first inner city Mexican nightclub/dance hall and provided a very coveted service for this market. They had a beer license, a stage, dance floor and a lights and sound system for live and recorded music. Vanandy's was such a popular nocturnal destination that from the day that it opened until its closing date, Vanandy's was always full; it is no secret in the Mexican business community that Vanandy's was a highly lucrative business, creating great wealth for the owners. Despite its rustic and un-cared for decor, Vanandy's was the envy of all local Mexican music promoters because of the revenues it brought in. Vanandy's was open three nights a week, Friday-Sunday and closed during the week. MLET's own field research done in the year 2000 indicates that at 10:00 pm on various occasions, the door was closed to patrons due to a full house, with only a local band playing. Food was never functionally served at Vanandy's, which only had a beer and wine license.

#### *Negative attributes:*

Perhaps the biggest stigma that remains regarding Vanandy's is the lack of professionalism of the Management of the business, which the owners conducted remotely from Chicago. Their apparent lack of standard

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<sup>6</sup> Ex. R2.

business and sound accounting practices, and their disregard for the City's Licensing and code regulations left much to be desired from these Mexican entrepreneurs from Chicago. There was also an apparent lack of investment back into the business, allowing it to remain run-down and unkept, despite the profits made by the owners. Vanandy's as a business was considered a poor neighbor, leaving trash strewn about from the night before in front of neighboring businesses and parking lots. The goal of El Nuevo Rodeo and La Quebradita Restaurant is to fill this market niche with a new and improved and greatly expanded product, only this time using sound business practices with a fully professional operation and management team, which will become a model Latino-run establishment and a source of pride in Latino Business community. Despite the downfall of the Vanandy's operation, they served as an ideal market study for El Nuevo Rodeo and La Quebradita Restaurant and an unwavering testimony to the success that such an establishment will have at this location in this micro-market.<sup>7</sup>

7. Review of the ENR license application was conducted by the Minneapolis Police Department License Inspection Division (Division). The Division report noted that ENR will be operated as a restaurant with hours from 10:00 a.m. to 2:00 a.m. The report also included the following:

**PREMISES:**

The licensed premise consists of 18,000 net square feet of street level and second floor areas in the Oddfellows building located at 2709 and 2709 1/2 East Lake St. The ground floor area will be primarily used as a restaurant. This restaurant will have a seating capacity of 77 persons at tables and chairs and a bar seating 12 persons. The second floor portion of the premises, which is connected to the ground floor by a stairway and dedicated elevator, is divided into two areas. The first area has additional restaurant seating for 64 persons at tables and chairs. Separated from this area by a low wall is a bar/dance area with a disc jockey booth. An oval-shaped bar with seating for 23 persons is also present. The second portion of the second floor area has a bar with seating for 17 persons and seating for 160 persons at tables and chairs. A stage and dance floor will be present. The total seating capacity is 573 persons.

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**CLASS A ENTERTAINMENT:**

The applicant has applied for a Class A license and, although the establishment will not be located within the Adult Entertainment District, has completed has completed [sic] the Class A License Addendum

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<sup>7</sup> Ex. R1 at 15.

wherein the applicant acknowledges that the license is subject to suspension, revocation or denial of renewal if adult entertainment were to be presented.

The applicant intends to present disc jockeys, local, national and international Mexican bands and stage shows. Additionally, the establishment will be available for wedding celebrations, baptisms, Mexican festivals such as Cinco de Mayo.

#### **MISCELLANEOUS ORDINANCE REQUIREMENTS:**

Zoning: The Minneapolis Zoning Administrator has certified that this establishment is located in a C-2 zoning district, which is a lawful district for the intended use.

Customer Parking: The off street parking requirement for this restaurant is established by the Minneapolis Zoning Code. The Minneapolis Zoning Administrator has certified that this establishment is exempt from off street zoning requirements. The applicant will furnish a valet service to the US Bank parking lot located at 2800 East Lake Street. The applicant's Landlord, Lake 27, LLC has entered into a licensing agreement with US Bank for patrons to use this 70-space parking lot. The agreement has been registered with the zoning office.

\* \* \*

#### **Must Be a Restaurant**

Because this establishment will be located within 500 feet of a residentially zoned area, it is required to operate as a restaurant and gross annual sales of alcoholic beverages may not exceed 40% of gross annual sales of all food and beverages.<sup>8</sup>

8. On June 20, 2003 the City's Zoning Office Representative, Stephen Poor, approved the Zoning Addendum for Beverage Alcohol License Applicants in Minneapolis to operate as a restaurant and club in the City with a Class A Liquor License with Sunday Sales on June 20, 2003.<sup>9</sup> The only restriction on the license was that there be no adult-oriented entertainment. The application was approved by the Minneapolis City Council. ENR first began operations in June of 2003 when it obtained the Class A On-Sale Liquor License with Sunday Sales.<sup>10</sup>

9. During the application process, ENR, through Ms. Lopez-Santamaria, extensively discussed with the City Licensing Division how ENR was anticipating to operate. The presence of entertainment, including the likelihood of large attendance

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<sup>8</sup> Ex. R4.

<sup>9</sup> Ex. R2.

<sup>10</sup> Ex. P318.

during special events, the use of the premises for a cultural center, and the proposed uses for educational purposes was disclosed to Inspector Zeigler. At no time did any City official indicate that the intended uses of the premises were in any way inconsistent with the business licensing that was being applied for, and was granted by the City. The name of the business at the time it was initially licensed by the City was El Nuevo Rodeo Nightclub and La Quebradita Restaurant.<sup>11</sup>

## **ENR's Business Operations**

10. There are two entrances at ENR. When a cover charge is required, lines of patrons form at the entrances. Upon entry, patrons are not seated at tables. Patrons choose whether to sit or stand. There are two floors with seating on each. The upper floor (main floor) has a bar area, a stage, and two areas designated as dance floors. The lower floor contains seating for a maximum of 94, with a counter area and kitchen. ENR's main floor plan showed seating around two bars, and along the walls and in the area between the two dance floors. In total, the floor plan showed 353 seats.<sup>12</sup>

11. While ENR is a for-profit business, it has engaged in extensive community-based educational and cultural activities. Meetings, fundraisers, and educational seminars have been conducted on the premises to benefit nonprofit organizations in the community. These activities use the stage and dance areas of the main floor for functions much closer to those of a community center than a restaurant.<sup>13</sup>

12. Alejandro Rojas is ENR's Executive Chef. He has worked for ENR for three years. Mr. Rojas described ENR's food operations as preparing and serving food every day, sometimes until early hours of the following morning. On some occasions Mr. Rojas has served food at ENR as late as 4:00 a.m.<sup>14</sup>

13. ENR's entertainment director and promoter, Antonio Gaytan, has been employed there for six years. Mr. Gaytan noted that, in contrast to ENR's operations at other times, on weekend nights most of the patrons are there to view the live entertainment. When live music is being performed, ENR uses a digital decibel monitor to check noise levels within the building and from a point 50 feet outside the building.<sup>15</sup>

14. ENR has approximately 50 employees. About one thousand musicians and performers have been employed giving performances as part of ENR's events. Approximately 20 suppliers of food for ENR's restaurant operations have significant sales to ENR.<sup>16</sup>

15. On normal business days, the main floor is not set up or used for entertainment or restaurant seating until the evening hours.<sup>17</sup> When open, patrons are

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<sup>11</sup> Test. of M. Lopez-Santamaria.

<sup>12</sup> Test. of Julie Casey; Ex. P57.1-P57.2.

<sup>13</sup> Test. of M. Lopez-Santamaria.

<sup>14</sup> Test of A. Rojas.

<sup>15</sup> Test of A. Gaytan; Test. of M. Lopez-Santamaria.

<sup>16</sup> Test. of M. Lopez-Santamaria.

<sup>17</sup> Test. of J. Casey; Ex. P57.1-P57.2.

seated at tables on the main floor by waitstaff, provided menus, encouraged to order food, and orders for food and drink are taken. Patrons seated at tables have their food and drink orders delivered by waitstaff. When no more seating is available, patrons gravitate to the bar areas to await seating or dance in the areas in front of the stage.<sup>18</sup>

16. Any business seeking to make a substantial change in how that business is operated must file a new business plan. The City License Division's practice is for the new business plan to be filed and approval of that substantial change be obtained.<sup>19</sup>

17. On April 16, 2009, ENR had temporary bars available for use on the premises.<sup>20</sup> ENR's business plan does not make any reference to the use of temporary bars.<sup>21</sup>

## **Methods of Enforcement**

18. The City License Division uses four different levels of enforcement to compel adherence to ordinances and statutes, or to sanction offending licensees. These enforcement methods are advisory notices, violation notices, administrative citations, and settlement conferences. Generally speaking, these methods are comprised of the following:

- A. Advisory notices are sent to a license holder when the City License Division believes that a city ordinance may have been violated by the licensee. The purpose of this notice is to inform and warn the licensee in order to prevent further possible violations of city ordinances. No fines are associated with advisory notices.
- B. Violation Notices are sent to a license holder when the City License Division believes that a city ordinance may have been violated by the licensee. The purpose of this notice is to strongly urge, inform and warn the licensee in order to prevent further possible violations of city ordinances. Fines may be present with violation notices.
- C. Administrative Citations are sent to a license holder when the City License Division believes that a city ordinance may have been violated by the licensee. The purpose of this notice is to penalize the licensee for alleged violations of city ordinances. Fines are present with administrative citations. Administrative citations may be paid, or be contested by a written request for Hearing. When fines are paid they are an admission of the violation.
- D. Settlement Conferences are scheduled between the licensee and the City License Division. The purpose of these Settlement Conferences is to

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<sup>18</sup> Test. of M. Lopez-Santamaria.

<sup>19</sup> Test. of R. Cervantes.

<sup>20</sup> Test. of J. Casey; Exs. P311 and P317.

<sup>21</sup> Ex. R1.

bring the licensee into compliance with City and State Ordinances, Statutes, and Codes. The licensee does not have to agree to any of the recommendations from the City License Division, but the licensee is compelled to do so to avoid further adverse action by the City License Division. Furthermore, the stipulations in the Settlement Conference must be accepted and approved by the City's Mayor and the City Council.<sup>22</sup>

### **Overview of Police Reports and Criminal Activity**

19. Over the 29 months between April 13, 2007, and November 26, 2009, there were 35 incidents that resulted in the generation of police reports that were linked to activity occurring on or near to ENR premises. The incidents reported were connected, to a greater or lesser degree, to ENR or their patrons. Further analysis of the reports reveals that:

- A. 27 of the reported incidents occurred at times coincident with ENR Saturday or Sunday night venues.
- B. 33 of the reported incidents occurred after midnight, and 13 of those incidents occurred after 2:00 a.m.
- C. At least 26 of the thirty-five incidents were handled by off-duty police officers employed by ENR to improve security.
- D. The incidents included: three minor consumptions of alcohol, four violations of curfew, eight disorderly conducts, three obstructing the legal processes, six possession of narcotics, ten fifth-degree assaults, and three second-degree assaults with a dangerous weapon.<sup>23</sup>

### **License Enforcement Issues**

20. In 2006, several problems were identified with the manner in which ENR was being operated. To address compliance issues, the City License Division initiated settlement negotiations with ENR and conducted a licensing settlement conference on December 11, 2006. The City License Division sought to impose conditions on ENR's Class A On-Sale Liquor License with Sunday Sales. The City License Division recommended and ENR agreed to the following license conditions:

- A. ENR would submit to the City License Division within 30 days an independent accountant's detailing of ENR's liquor/food ratios for a period of twelve months.

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<sup>22</sup> Test. of R. Cervantes; Test. of J. Casey; Test. of Michele Olds.

<sup>23</sup> Exs. P60-P69, P78-P122, P143-P267, P275-P281, P309-P310.



- B. ENR would be penalized \$9,400.00 for violation of Minnesota Code 1001.2 and 1003.1 Fire Exceeding Legal Occupancy, of which \$5,400 was stayed and \$4,000.00 must be paid.
- C. ENR would continue “to follow the business plan and premise drawing that was submitted with the original liquor license application on June 16, 2003 with slight modifications submitted within 30 days of signing this agreement in order to reflect the number of seats/tables currently available.”
- D. ENR would discontinue snipe advertising.
- E. ENR would be penalized \$100.00 per day to the City, totaling \$3,100.00, for violating the Valet License requirement, with the fine being stayed, provided that there are no same or similar violation(s).
- F. ENR would stop advertising and operating as a nightclub.<sup>24</sup>

21. ENR has shown that its sales are in compliance with requirement in the Minneapolis Code of Ordinances (MCO) for restaurant liquor licenses that 60 percent of its revenue be derived from the sale of food and no more than 40 percent of its revenue from sale of alcoholic beverages (the 60/40 rule).<sup>25</sup>

22. From August to October, 2007, City Inspector Olds visited ENR on six different evenings and two afternoons. Inspector Olds concluded that ENR was operating as a nightclub and not a restaurant. Her conclusion was based on the number of people drinking compared to the number of people eating, patrons not ordering full meals in the period after 10:00 p.m., and the number of seats available during ENR's late night hours of operation. Inspector Olds observed that ENR was following the seating plan approved by the City License Division when she inspected the business premises. Inspector Olds maintained that the City License Division should revoke ENR's liquor license since “zoning does not allow it” [ENR operating as a nightclub]. These considerations were the basis of the City License Division's issuance of an administrative citation on August 22, 2007 for a violation of Minneapolis business license management ordinance 259.250 for operating as a nightclub. The stated basis for the citation was due to ENR having a lack of seating.<sup>26</sup> ENR paid the fine that was imposed through the administrative citation.

23. On October 12, 2007, Inspector Olds issued an administrative citation to ENR for a violation of MCO § 259.250 for advertising as a nightclub. ENR's owner explained that the advertising text arose from a typographical error, which, upon receipt of the citation error, was corrected.<sup>27</sup>

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<sup>24</sup> Exs. P11-P12.

<sup>25</sup> Ex. R7; Test. of J. Casey; Test. of Griselle Bermudez.

<sup>26</sup> Exs. P47.1, P49-P55; Test. of M. Olds.

<sup>27</sup> Exs. P47.1, P56; Test. of M. Olds; Test. of M. Lopez-Santamaria.

24. On April 28, 2008, a shooting occurred on the corner of 27<sup>th</sup> and Lake Street. The Minneapolis Police Department (MPD) investigated and found that there was no discernable connection between the shooting and ENR. The City License Division and Minneapolis City Council Member Gary Schiff did not accept the conclusion of the MPD and continued to investigate whether some connection existed between the persons involved in the shooting and the patrons of ENR. No evidence of a connection between the persons involved in the shooting and ENR has been presented in this proceeding.<sup>28</sup>

25. On August 31, 2008, Inspector Casey observed two individuals leave ENR, each with a can of beer. These individuals remained in the area drinking the beer and then threw the empty cans of beer onto the ground. Inspector Casey also observed that the live entertainment did not stop until 2:05 a.m. and that some who were leaving the establishment were highly intoxicated. She observed one patron urinate on the street. ENR security witnessed these activities and did not intervene to stop these nuisance behaviors.<sup>29</sup>

26. On September 2, 2008, the City License Division issued an administrative citation for a violation of MCO § 362.20 (f) for allowing liquor to leave the ENR premises and a violation of MCO § 360.70 for allowing live entertainment past 2:00 a.m.<sup>30</sup>

27. On September 8, 2008, the City License Division issued a Violation Notice to ENR for an alleged violation of Minneapolis liquor ordinances for allowing loitering in front of ENR.<sup>31</sup>

## **2008 Settlement Conference**

28. In early September 2008, Ms. Lopez-Santamaria had a meeting with Inspector Olds and Deputy Director Cervantes. The only issues raised in this meeting were an instance of an employee drinking beer on the premises after 2:30 a.m., and the April 28, 2008 shooting. Ms. Lopez-Santamaria was told that there was no connection between that shooting and ENR. No concerns were raised by the City License Division about ENR's methods of operation or any assertion that ENR was a nightclub.<sup>32</sup> The result of this meeting was the Settlement Agreement entered into between ENR and the City License Division which added to ENR's license the following conditions:

- A. The City will impose a \$500.00 sanction due at the time of signing this agreement.

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<sup>28</sup> Exs. P123-P143, R12, R14, R17, R19, R23; Test. of R. Cervantes; G. Schiff.

<sup>29</sup> Test. of J. Casey.

<sup>30</sup> Ex. P41.

<sup>31</sup> Exs. P32, P38, P39, P41, P42, P43, P43.1; Test. of J. Casey.

<sup>32</sup> Test. of M. Lopez-Santamaria.

- B. The Licensee shall adjust the security/alcohol service policy to reflect that no one shall consume alcohol on the premises after 2:30 a.m. and before 8:00 a.m. all days of the week, except Sundays when no consumption is allowed before 10:00 a.m.
- C. The Licensee shall provide a current and approved security/alcohol service policy to Licensing, due at the time of signing this agreement.
- D. The Licensee shall follow the submitted security/alcohol service policy to Licensing, due at the time of signing this agreement.
- E. The Licensee shall employ security personnel at a ratio of one (1) security guard per fifty (50) patrons and one (1) off-duty Minneapolis Police Officer. The Licensee shall employ two (2) off-duty Minneapolis Police Officers on nights when the expected attendance is 700 or more.
- F. The Licensee will attend a police training that focuses on learning about gangs in the City, through Police Licensing, provided by Minneapolis Police Department personnel by October 1, 2008.
- G. The Licensee will remove all patrons under eighteen (18) years of age by 10:00 p.m. every night, unless they are accompanied by a responsible guardian. The Licensee will have the responsible guardian sign a responsibility form.
- H. One of the security personnel for the Licensee will be stationed in the U.S. Bank parking lot from 9:00 p.m. to 3:00 a.m. looking for loitering, drinking in cars, fights, etc. Security must call 911 when crimes are witnessed.
- I. ENR currently has sixteen (16) security cameras with digital recorders with forty-five (45) days retention. Management will purchase and install twelve (12) more cameras by September 30, 2008. ENR will provide copies of digital recordings to the Division of Licenses and Consumer Services or Minneapolis Police if required to assist in a criminal or civil investigation and subject to receipt of a Subpoena or an Order from a Court of Law requesting disclosure. The management will provide a map of where all the cameras are located by September 15, 2008.
- J. The Licensee will post a sign at the main entrances of ENR saying that they ban guns and weapons on their premises.
- K. The Licensee will purchase a metal detection wand for scanning patrons by August 31, 2008. All patrons entering the facility will be wanded before entering. Patrons with guns, knives and weapons will be denied entry.
- L. The Licensee will make sure that patrons leaving the restaurant do not carry beverage bottles outside of the establishment.

- M. The Licensee will have door staff monitor the actual number of patrons less than twenty-one (21) years of age in the establishment.
- N. The Licensee will attend at least one Downtown Bar Meeting or LINC Meeting in the next two months after signing this agreement. Inspector will provide dates and time to Licensee.<sup>33</sup>

29. Overall, Inspector Olds perceived ENR as being responsive to addressing concerns raised by the City License Division and making changes in business procedures to ameliorate those concerns.<sup>34</sup> Ms. Lopez-Santamaria believed that the conditions were excessive, but agreed that ENR would make the changes set out in the conditions agreed to on September 10, 2008, to be proactive and demonstrate ENR's cooperation with the City License Division.<sup>35</sup>

30. The Licensing Division suggested that ENR might be better suited to the downtown entertainment district. Ms. Lopez-Santamaria felt she had too much invested in the current location to make relocation a realistic option.<sup>36</sup>

31. On September 25, 2008, the City License Division renewed ENR's business licenses.<sup>37</sup>

### **Post Settlement Conference Violations**

32. On September 27, 2008, a patron was arrested for possession of cocaine in a bathroom of ENR.<sup>38</sup> No evidence was submitted suggesting that the individual obtained the illegal drug at ENR.

33. On September 28, 2008, several patrons were ejected from ENR for unruly conduct. One of these individuals struck an MPD officer as he was leaving the area and the individual was arrested.<sup>39</sup>

34. On October 12, 2008, a patron inside ENR threw a beer bottle during an altercation.<sup>40</sup>

35. On October 13, 2008, the driver for the band appearing at ENR was assaulted by an individual with a crowbar. The assault occurred outside of ENR and no one identified the attacker as having any connection with ENR.<sup>41</sup>

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<sup>33</sup> Exs. P13-P15.

<sup>34</sup> Test. of M. Olds.

<sup>35</sup> Test. of M. Lopez-Santamaria.

<sup>36</sup> Test. of R. Cervantes; Test. of M. Lopez-Santamaria

<sup>37</sup> Test. of G. Schiff.

<sup>38</sup> Test. of R. Cervantes.

<sup>39</sup> Test. of R. Cervantes.

<sup>40</sup> Test. of R. Cervantes.

<sup>41</sup> Test. of R. Cervantes.

36. In a separate incident on October 13, 2008, a patron was ejected from ENR for unruly conduct. That patron refused to leave the area and started a fight.<sup>42</sup>

37. On October 18, 2008 Inspector Casey observed an individual remove a bottle of beer from ENR. Consequently, ENR was administratively cited on October 20, 2008 for a violation of Minneapolis liquor ordinance 362.20, which occurred on October 18, 2008 for allowing liquor to leave the ENR premises.<sup>43</sup>

38. On October 31, 2008, a patron was ejected from ENR for unruly conduct. That patron refused to leave the area and he was detained by MPD officers. In running a status check, the officers discovered that the patron was wanted on an outstanding warrant and he was arrested.<sup>44</sup>

39. On November 2, 2008, a patron was ejected from ENR for unruly conduct. That patron refused to leave the area and started a fight. The patron was arrested by MPD officers.<sup>45</sup>

40. On November 14, 2008, a gang-related shooting occurred at the corner of 28<sup>th</sup> and Lake Street. The shooting occurred across the street from ENR and no one identified any connection between the shooting and ENR.<sup>46</sup>

41. On November 15, 2008, an assault occurred inside ENR as two security employees attempted to eject a patron.<sup>47</sup>

42. At approximately 12:58 p.m., on November 21, 2008, Deputy Director of Inspections Ricardo Cervantes responded to a request for an update from Councilmember Schiff regarding ENR. That update was copied to a number of City officials including Rocco Forte, Director of the City License Division, and stated:

Licensing Staff Met with Police Licensing on Tuesday and 3rd Precinct on Wednesday, to discuss the Police reports generated on Saturday, 11-15, review the history of the business, and determine next steps. It was determined that some the police reports did not clearly connect the activity to El Nuevo Rodeo. This has been communicated to Inspector Gerold and Officers involved in the incidents have been directed to submit supplemental reports providing more detail including the nexus with the Business. A subpoena will be delivered to Licensee, Maya Santa Maria for video taken during that morning, a cost estimate of police resources used that night is under way, a detailed history of violations and a summary of police activity is being compiled to be used as evidence for adverse action.

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<sup>42</sup> Test. of R. Cervantes.

<sup>43</sup> Exs. P44, P45, P46; Test. of J. Casey.

<sup>44</sup> Test. of R. Cervantes.

<sup>45</sup> Test. of R. Cervantes.

<sup>46</sup> Test. of R. Cervantes.

<sup>47</sup> Test. of R. Cervantes.

After review of El Nuevo webpage, schedule of events, License Inspectors along with Police will be conducting inspection on nights where large crowds are expected. On duty and off duty Squads called to this address have been asked to direct vehicle cameras at this location while on the scene when available. License Inspector Casey has compiled a list of licensing ordinances and license conditions that will be distributed at 3rd Precinct roll call to assist in the documentation of further violations.

When I have received the summarized police reports and license violation history I will meet with our city attorney to discuss a revocation action.<sup>48</sup>

43. At approximately 1:44 p.m., on November 21, 2008, Director Forte provided an update by email on issues that Councilmember Schiff raised, stating in pertinent part:

**El Nuevo Rodeo**

At this point, Business Licensing does not see any other option than to pursue a revocation of El Nuevo Rodeo's license. We have had the licensee in on numerous different occasions and have added numerous conditions to the license, all to no avail. We intend to pull the Licensee in as soon as possible and ask for the voluntary surrender of the license. Alternatively, we will ask an Administrative Law Judge to revoke the license and close the business.<sup>49</sup>

44. As of November 28, 2008, the City License Division had drawn no clear nexus between the operations of ENR and any criminal behavior on November 11 through November 15, 2008. Video recordings from the ENR security cameras were made available for review by the MPD for investigation of the events over that timeframe.<sup>50</sup> No evidence from those security cameras was cited by the City License Division in this proceeding as showing any wrongdoing by ENR.

45. During her inspection on November 28, 2008, Inspector Casey observed that ENR allowed live entertainment past 2:00 a.m. to 2:05 a.m. Consequently, ENR received a Violation Notice on December 3, 2008 for a complaint of conditions at ENR, alleging a violation of MCO § 360.70 (f) for allowing live entertainment past 2:00 a.m.<sup>51</sup> She also observed and photographed a man consuming a bottle of beer after 2:30 a.m. at ENR. Inspector Casey issued an administrative citation to ENR on December 4, 2008, for a violation of MCO § 364.85, by allowing the consumption of alcohol on the premises of ENR between the hours of 2:30 a.m. and 8:00 a.m.<sup>52</sup>

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<sup>48</sup> Ex. R 38.

<sup>49</sup> Ex. R 35.

<sup>50</sup> Test. of R. Cervantes.

<sup>51</sup> Exs. P36, P36.1; Test. of J. Casey.

<sup>52</sup> Exs. P36, P36.1; Test. of J. Casey. The City License Division maintains that the observation of consumption occurred on November 28 and was erroneously attributed to December 3, 2008. City Brief, at 3.

46. On December 1, 2008 Inspector Casey conducted an inspection of ENR in the afternoon. She observed and took photographs of construction work that was being conducted on the main floor. No building permit had been obtained for that work. Inspector Casey counted the chairs present at that time and arrived at the number 285.<sup>53</sup> Inspector Casey did not include the folding chairs that were moved to the basement to make room for the construction work. The main floor was not in use at the time the count was made.<sup>54</sup>

47. As a result of the November 28, 2008 and December 1, 2008, inspections the City License Division issued a Violation Notice for a Complaint of Conditions to ENR. The Violation Notice alleged that:<sup>55</sup>

- A. ENR violated MCO §§ 362.395 and 362.30 in November, 2008 by operating as a nightclub within 500 feet of a residentially zoned area without a Conditional Use Permit.
- B. ENR operated as a nightclub is in violation of “On Sale” license provisions since ENR “was operating beyond a restaurant.”
- C. ENR failed to maintain 573 seats as required per the 2003 ENR business plan; since there were only 285 seats present on the first and second floors during the December 1, 2008 inspection.
- D. ENR had temporary bars, temporary dance floors, and standing areas (over 2000 square feet) for the purpose of watching live entertainment, that were not permitted.
- E. ENR was required to operate as a restaurant and not a nightclub.
- F. ENR needed to submit a new floor plan to the City License Division that showed the location of 573 seats between the two floors.

48. On December 4, 2008, a Notice of Ordinance/Code Violations from the Regulatory Services & Emergency Preparedness Construction Code Services Division was sent to the building owner for violation of MCO §§ 85.20 and 93.20, and the Minnesota State Building Code (Minn. R. 1300.0120, 1300.0140 and 1300.0150) for performing construction work without a permit. This Notice was copied to ENR. ENR obtained the necessary permits after the notice was received.<sup>56</sup>

49. As of December 2, 2008, the City License Division had not yet assembled the evidence that would support a conclusion that ENR’s license should be revoked.<sup>57</sup>

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<sup>53</sup> Exs. P36, P36.1; Test. of J. Casey.

<sup>54</sup> Test. of M. Lopez-Santamaria.

<sup>55</sup> Exs. P49-P53, P58, P59, P318, R2-R4; Test. of J. Casey; Test. of M. Olds; Test. of R. Cervantes; Test. of M. Lopez-Santamaria.

<sup>56</sup> Exs. P70.1, P70.2, P71- P76; Test. of J. Casey.

<sup>57</sup> Test. of R. Cervantes.

50. On May 3, 2009, a rape was reported as occurring in the driveway of a Minneapolis resident in the neighborhood approximately one block from ENR. The subsequent police investigation revealed no link between this criminal behavior and the actions of ENR.<sup>58</sup>

51. On May 4, 2009, an incident occurred inside ENR when a patron refused to comply with ENR security's direction to surrender his beer (because it was 2:30 a.m. and no one could be drinking alcoholic beverages). The patron began throwing punches at ENR security personnel, who handcuffed the patron and removed him from the premises. In the struggle, the patron bit one security staffer on the elbow and in the groin area. Before the handcuffs were removed, that security staffer wrote the word "FAG" on the patron's forehead using a permanent marker. After the staffer released the patron, he called the MPD, who investigated. The ENR security staffer admitted his conduct and attributed it to the patron's assault.<sup>59</sup>

52. The owner, Ms. Lopez-Santamaria and head of security, Carmen Moran, were on the premises during the altercation but not in the area where the staffer's misconduct occurred. The particular staffer was newly hired and still on probation. Ms. Lopez-Santamaria described his employment references as excellent and noted that the staffer had significant relevant experience, which had influenced the decision to hire that staffer. Based on his conduct that evening, that staffer was promptly fired from ENR.<sup>60</sup>

53. On October 3, 2009, Inspector Casey observed live entertainment that ended at 2:05 a.m. at ENR. Consequently, ENR received a Violation Notice on October 7, 2009, for an alleged violation of MCO § 360.370(f) for allowing live entertainment after 2:00 a.m.<sup>61</sup>

54. On one occasion in 2008, ENR hosted a "hip-hop night" event. The attendance was very large and ENR considered the event to be very profitable. The clientele that were attracted to ENR for that event were characterized as a "tough crowd." ENR security staff had difficulty maintaining ENR's standards due to the nature of the crowd. ENR concluded that no further events of that nature would be hosted to avoid a repeat of that evening's events.<sup>62</sup>

55. The City License Division described its basis for proceeding with license revocation against ENR as the conclusion that ENR was operating as a nightclub, and included the police reports of criminal behavior in the neighborhood. The City License Division characterized that behavior as the result of ENR operating as a nightclub. The City License Division noted that lesser sanctions for noncompliance with the liquor

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<sup>58</sup> Ex. R50; Test. of G. Schiff.

<sup>59</sup> Exs. 251-255; Test. of M. Lopez-Santamaria.

<sup>60</sup> Test. of M. Lopez-Santamaria.

<sup>61</sup> Exs. P268, P269; Test. of J. Casey.

<sup>62</sup> Test. of M. Lopez-Santamaria.



license provisions of the MCO are appropriate where ENR's operation is within the status of a restaurant.<sup>63</sup>

56. At the time of hearing in this matter, ENR has paid all of the administrative citations and all of the violation notices that had fines associated with them. The City has received payment for all violations and citations.<sup>64</sup>

### **Community Impact**

57. Since 2008, fewer than ten residents and business owners near ENR have complained to City officials that ENR is causing negative livability issues in their neighborhood. These complaints have primarily been that patrons leaving ENR after closing are loud, disorderly, and generally disruptive. At the time of the April 28, 2008 gang-related shooting across the street from ENR, complaints were received attributing that shooting to ENR's operations. There is no evidence to support a conclusion that this criminal activity was in any way connected to ENR.<sup>65</sup>

58. The majority of the complaints regarding ENR related to its Saturday night events. On Saturday nights, ENR features live Latino-oriented entertainment. This entertainment usually draws capacity crowds. ENR also hosted a variety of community events for the Latino community.<sup>66</sup>

59. Inspector Olds and Inspector Casey each opined that the activities at ENR and the patron behavior that they observed pose a problem for the neighboring residential community. This patron behavior, in the estimation of the inspectors, negatively impacts the livability of the neighborhood and supports City License Division intervention. Inspector Casey maintained that off-duty police officers are not a good source of security. That perception arises out of Inspector Casey's belief that the business, as the employer, exercises undue control over the off-duty officers.<sup>67</sup>

60. The ALJ finds the off-duty officers' testimony to be highly credible and finds no evidence to support a conclusion that their testimony is influenced by their contractual relationship with ENR.

61. The off-duty police officers employed by ENR noted that restaurants and bars located in other neighborhoods in Minneapolis, such as the "Downtown" area, generate more calls for service and police reports than does ENR. ENR has significantly fewer problems compared to other similar establishments in the City, and neighborhoods.<sup>68</sup>

62. ENR submitted a petition signed by 1,194 people in support of ENR maintaining its existing operations. ENR described the signatories as neighbors and

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<sup>63</sup> Exs. P268, P269; Test. of R. Cervantes.

<sup>64</sup> Exs. P282-P310; Test. of J. Casey.

<sup>65</sup> Test. of R. Cervantes; Test. of M. Lopez-Santamaria; Test. of G. Schiff.

<sup>66</sup> Test. of R. Cervantes; Test. of G. Schiff.

<sup>67</sup> Test. of J. Casey; Test. of M. Olds.

<sup>68</sup> Exs. R67, R68; Test. of Frank Kutz; Test of Derrick Chauvin.

patrons. The petition stated that the signatories believe ENR is an important cultural asset to the Latino community, and that ENR is “enjoyed by thousands neighborhood residents and that they greatly outweigh the handful of senior residents whom have complained for petty issues (at ENR) in the past years - most of which have now been addressed and resolved.”<sup>69</sup>

63. On January 25, 2010, State Senator Patricia Torres Ray wrote a letter to Council Member Schiff, supporting continued operation of ENR. Senator Torres Ray noted the letter highlights the financial benefits, in the form of tax revenue, to the State of Minnesota, the City, and through the employment that ENR provides for its employees. Senator Torres Ray expressed her belief that ENR provides an important role in the Latino community as a “cultural Mecca in Minnesota for Mexican and Latin music, art and entertainment . . . there is truly nowhere else like it for Latinos in the state.”<sup>70</sup>

64. Joyce Wisdom is the Executive Director of the Lake Street Council (LSC) and a resident of the neighborhood that includes ENR. Ms. Wisdom expressed her perception that the behavior of ENR has significantly improved over the years. The LSC has never had any complaints regarding ENR from any of the other LSC members. Ms. Wisdom maintained that ENR is “in the spirit with” the 27th and Lake Entertainment District Initiative (Initiative #8); seeking designation by the City Council of the neighborhood as a “retail and entertainment centered district.” While the City Council has not formally adopted the initiative, the LSC believes that ENR is a business that fits within the proposed neighborhood business plan.<sup>71</sup>

65. Melanie Majors is the Executive Director of the Longfellow Community Council. According to Ms. Majors, it has been 18 months since the Council had a complaint about ENR. She has not had to hold any community meetings to deal with issues arising from ENR. Ms. Majors opined that ENR is a crime deterrent in the Longfellow area because it remains open late and has off-duty police protection during those hours. The Longfellow Community Council supports Initiative #8 which would make the area around ENR an entertainment district. ENR would compliment that initiative.<sup>72</sup>

### **ENR Security Policies and Off-Duty Police Officers**

66. ENR has implemented multiple preventative measures to address security concerns both on and immediately adjacent to the business premises. ENR has retained the services of off-duty police officers. In addition, ENR has increased its

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<sup>69</sup> Exs. R72, R73.

<sup>70</sup> Ex. R74.

<sup>71</sup> Ex. R75; Test. of J. Wisdom.

<sup>72</sup> Test. of Melanie Majors.

private security staff and has installed all of the video cameras inside and outside the premises as stipulated in the September 10, 2008, settlement agreement.<sup>73</sup>

67. ENR has one or two off-duty police officers employed on weekend nights to maintain security at ENR and to address neighborhood livability issues. On rare occasions, ENR requires more off-duty police officers in order to provide additional security. The off-duty officers that work at ENR have effective and frequent communication with the security staff. The management of ENR communicates with the off-duty officers to maintain a high level of security.<sup>74</sup>

68. ENR maintains a "Trespassing List" or "86 List" containing the names and photocopies of the driver's licenses or identification cards of people who have been banned from ENR. ENR maintains a record book, which the security staff reviews before beginning each shift, to prevent unauthorized people from entering ENR when examining potential patrons' identification.<sup>75</sup>

69. ENR maintains a strict no tolerance policy for weapons and narcotics. ENR conducts a physical search for drugs and weapons of all people who enter their premises. The physical search for narcotics is conducted by hand; the security staff also utilizes a metal detector to check for weapons on all patrons who initially enter ENR, and all patrons who exit then reenter ENR. ENR has two "wand-style" metal detectors for this purpose.<sup>76</sup> Any person who violates ENR's drug or weapon policy is immediately turned over to the off-duty police officer present. Any narcotics or weapons found on individuals are turned over to the off-duty police officers. The police then handle these limited incidents, at their discretion, in accordance with the law.<sup>77</sup>

70. ENR monitors all minors that enter the establishment. Minors must be accompanied by a parent in order to enter ENR. The names of the minors as well as the information of the parents are obtained when entering ENR. Once permitted entry, minors are identified with an ink "X" on their hand, while those displaying proper identification are given single-use wristbands. If a minor attempts to remove the ink marking, or stands within 4 feet of bar areas they are issued a warning. If a minor is observed violating this policy a second time, ENR security removes the minor from the public area, finds the parents, and then removes the party from ENR.<sup>78</sup>

71. ENR security staff removes people who appear to be intoxicated from the establishment. Their security works closely with the off-duty police officers present to ensure their individual safety, as well as that of the community, by taking the motor

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<sup>73</sup> Test. of R. Cervantes; Test. of D. Chauvin; Test. of F. Kutz; Test. of M. Lopez-Santamaria; Test. of Carmen Moran; Test. of Eric Mulvihill.

<sup>74</sup> Test. of D. Chauvin; Test. of F. Kutz; Test. of M. Lopez-Santamaria; Test. of C. Moran; Test. of E. Mulvihill.

<sup>75</sup> Test. of C. Moran; Test. of M. Lopez-Santamaria.

<sup>76</sup> Ex. R65; Test. of M. Lopez-Santamaria.

<sup>77</sup> Ex. R65; Test. of M. Lopez-Santamaria, Test. of D. Chauvin, Test. of F. Kutz, Test. of C. Moran, Test. of E. Mulvihill.

<sup>78</sup> Test. of C. Moran; Test. of E. Mulvihill.

vehicle keys of intoxicated individuals, and by encouraging these individuals to use public transportation or a taxicab when required to leave ENR.<sup>79</sup>

72. At approximately 3:00 a.m., ENR security staff sweeps the area for a full block around ENR to remove garbage that may have been discarded by ENR patrons leaving the premises. The ENR staff picks up that garbage no matter where it originated. ENR's cleaning staff does a second pass of that area after 4:00 a.m.<sup>80</sup>

73. ENR spent approximately \$120,679 in 2008 for security services. ENR paid approximately \$13,068 to retain the services of off-duty police officers, and approximately \$107,611 to employ its in-house security personnel.<sup>81</sup> The state-of-the-art security camera system installed in 2008, as part of the September 10, 2008 settlement agreement, cost over \$20,000.<sup>82</sup>

74. ENR spent approximately \$94,622 in 2009 for security services. It paid approximately \$20,595 to retain the services of off-duty police officers, and it paid approximately \$74,027 in to employ its security personnel.<sup>83</sup>

75. Deputy Director Cervantes described ENR's security plan as detailed and well-written. He concluded that ENR's security and off-duty police officers performed their duties as expected. Deputy Director Cervantes described ENR's security as having generally responded adequately to the incidents which occurred on ENR premises from 2008 to the date of the hearing in this matter.<sup>84</sup>

76. Deputy Director Cervantes noted that ENR security operations have shown exceptional improvements since 2008, and are in compliance with MCO § 259.250. Deputy Director Cervantes described the spike in the number of incidents requiring police involvement in 2008, as justifiable where related to the enforcement efforts taken by ENR to reduce illegal activity on ENR's premises. Deputy Director Cervantes acknowledged that from mid-December 2008, to the date of hearing, two of the five police-related incidents have occurred off of the ENR premises.<sup>85</sup>

77. Carmen Moran, ENR head of security from June 2007 through November 2009, has 10 years of previous nightclub security experience and described ENR's security operation as:

- A. ENR's security has drastically improved since she has been employed there, as a result of multiple changes in ENR's security polices and practices.

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<sup>79</sup> Test. of C. Moran.

<sup>80</sup> Test. of M. Lopez-Santamaria.

<sup>81</sup> Ex. R65; Test. of G. Bermudez.

<sup>82</sup> Ex. R65; Test. of M. Lopez-Santamaria.

<sup>83</sup> Ex. R65; Test. of G. Bermudez.

<sup>84</sup> Test. of R. Cervantes.

<sup>85</sup> Test. of R. Cervantes.

- B. ENR strictly enforces a policy that live entertainment is to stop no later than 1:50 a.m.
- C. ENR security staff thoroughly cleans the neighborhood after big events; which often results in ENR staff “picking up the garbage” from other businesses in the area (i.e. Denny’s).
- D. In response to the April 28, 2008, shooting that occurred off of ENR’s premises, ENR enhanced its security by having a range of 9 to 15 security guards on duty during event evenings, with two security guards posted in the adjacent U.S. Bank parking lot, and security personnel posted in the alley adjacent to ENR.
- E. ENR hired two armed security guards to patrol the street in front of ENR to improve the security of the area outside of the establishment.
- F. Only in rare instance have narcotics been found on individuals, and she has not seen or heard of anyone attempting to bring a weapon into ENR.
- G. Compared to other similar places that he has worked security, ENR is safer and has better security in place.
- H. ENR is a very safe place, and that ENR has enhanced the quality of life and the livability of the neighborhood.<sup>86</sup>

78. Eric Mulvihill, ENR head of security from December 2009 to the date of hearing, has a degree in criminal justice and 13 years of previous nightclub security experience in the downtown Minneapolis area. He described ENR’s security operation as:

- A. Strict enforcement of ENR’s security policies and procedures is maintained at all times.
- B. Any person who would attempt to bring drugs or a weapon into ENR would be turned over to police with the contraband.
- C. ENR is safer and has better security in place compared to other nightclubs that he has worked at previously in the City’s Downtown area.
- D. He has never seen drugs or weapons at ENR.
- E. ENR works very closely with law enforcement in order to maintain effective security, and has improved the radio communication of ENR’s security to improve the response of ENR security to address potential security risks.

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<sup>86</sup> Test. of C. Moran.

- F. ENR is the safest bar/restaurant that he has ever worked at, and ENR is much safer and has better security compared to that of nightclubs in the Downtown area.<sup>87</sup>

79. MPD Officer Frank Kutz has provided security as an off-duty officer at ENR for four years. Officer Kutz assessed security at ENR as having significantly improved over the time he has worked there. Officer Kutz made the following observations about conditions at ENR:<sup>88</sup>

- A. Effective communication has occurred on a regular basis between ENR's management staff, security staff, and the off-duty MPD officers to maintain the high level of security that has been established at the business.
- B. ENR's management has appropriately requested additional off-duty police officers when needed.
- C. On one specific occasion, ENR requested 12 off duty officers in the spring time of last year
- D. Regarding people who are accused of criminal activity; off-duty MPD officers have broad discretion when handling these alleged criminal offenses and ENR does not restrain officers from making arrests.
- E. ENR has fewer incidents, and less severe incidents in comparison to other similar establishments, but minor incidents can always be expected at establishments like ENR.
- F. Public urination occurs outside of ENR, but very infrequently.
- G. The two shootings that occurred in the vicinity of ENR were very unusual for that area of Lake Street and there was no known connection between the shootings and ENR.
- H. ENR's current operation requires only minimal assistance from on-duty law enforcement personnel.
- I. ENR fits within the neighborhood.
- J. As a general matter, loitering at any establishment is difficult to control by law enforcement, and ENR handles loitering very well.
- K. ENR has adequate security in place to protect its patrons, the community, and the neighborhood.

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<sup>87</sup> Test. of E. Mulvihill.

<sup>88</sup> Test. of F. Kuntz.

- L. ENR's security has drastically improved over the four years that he has worked there as an off-duty officer.
- M. ENR is very similar to "T's Place" (located next door to ENR) in the type of establishment and the type of security problems encountered.
- N. The area patrolled by the 3rd Precinct has gang issues, but these gang members are not patrons of ENR.

80. MPD Officer Derrick Chauvin has provided security as an off-duty officer at ENR for four years, typically working there two to three nights per week. Officer Chauvin assessed security at ENR as having significantly improved over the time he has worked there. Officer Chauvin made the following observations about conditions at ENR:<sup>89</sup>

- A. Patrons of "T's Place" have caused problems which Officer Chauvin has had to address while he was working off-duty at ENR.
- B. Officer Chauvin was working off-duty at ENR when a person displayed a firearm off of the premises of ENR. MPD policy places a higher priority on responding to such incidents. This policy required Officer Chauvin to respond to the off-premises situation. For this reason, he was not able to address an incident that occurred at ENR at the same time. The off-duty officers working in conjunction with ENR's security staff are in an ambiguous and difficult position when serious offenses occur off of ENR's premises.
- C. The 3<sup>rd</sup> Precinct has a high level of crime in comparison to the City average, but the majority of serious crime in the 3<sup>rd</sup> Precinct takes place west of Hiawatha Avenue [ENR is east of Hiawatha Avenue].
- D. The Downtown area nightclubs are far more disruptive than ENR.
- E. ENR provides adequate security and that there have only been one to two very minor incidents at ENR when he was working as an off-duty officer.
- F. Public urination occurs outside of ENR infrequently.

### **Event Closing Procedures**

81. ENR follows a standard practice of concluding its music at 1:50 a.m. At that time, on nights when live music has been playing, the live music ends and the entertainment director thanks the patrons for coming, not to drink and drive, not to litter or make excessive noise on the way back to their cars. The patrons are also informed about specials available in the restaurant and upcoming events. An informal lost and found is conducted. The patrons are informed that all alcoholic beverages must be

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<sup>89</sup> Test. of D. Chauvin.

consumed by 2:30 a.m. Recorded mariachi music is then played at a lower sound volume.<sup>90</sup>

## **False Alarms**

82. The City License Division cited ENR for an excessive number of false alarms. ENR paid the fines associated with the excessive number of false alarms. The City has not incurred undue expenses arising out responding to false alarms. In the opinion of Deputy Director Cervantes, the violations relating to false alarms do not rise to the level of conduct supporting license revocation.<sup>91</sup>

## **Notice of Hearing**

83. On January 19, 2009, the City License Division held a settlement conference with ENR and suggested that conditions be imposed on ENR's Class A Liquor License with Sunday Sales. ENR rejected the suggested conditions as being too restrictive of its business. ENR provided a proposed floor plan to be adopted as a condition on its license. The City License Division refused to agree to the new proposed floor plan.<sup>92</sup>

84. On May 15, 2009, the City issued a Notice and Order for Hearing to ENR, seeking a recommendation as to whether the City has good cause to revoke ENR's Class A On-Sale Liquor License with Sunday Sales.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Minneapolis City Council have jurisdiction in this matter under Minnesota law and the Minneapolis City Charter.<sup>93</sup>

2. The Minneapolis City Council has the authority to consider the charges against the Licensee and the adverse action, if any, that should be imposed by the City pursuant to Minn. Stat. § 340A.415, and Chapter 4, Section 16 of the Minneapolis City Charter.

3. The City License Division has complied with all relevant substantive and procedural legal requirements.

4. The City License Division gave the Licensee adequate and timely notice of the hearing and of the charges against it.

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<sup>90</sup> Test. of M. Lopez-Santamaria; Test. of A. Gaytan.

<sup>91</sup> Test. of R. Cervantes.

<sup>92</sup> Test. of M. Lopez-Santamaria.

<sup>93</sup> Minn. Stat. §§ 14.50, 14.55, 340A.402(3), and 340A.412(2)(b); Minneapolis Charter Chapter 4, Section 5, and Minneapolis Code of Ordinance §§ 259.250, 362.100, 362.260, 362.290, 362.500, and 362.510.



5. As the party proposing that certain action be taken, the City License Division has the burden of proving facts at issue by a preponderance of the evidence.<sup>94</sup>

6. The Minneapolis Charter authorizes the City Council to license and regulate all bars, taverns, restaurants and cafes. According to Chapter 4, Section 5 of the Charter:

Nothing herein shall limit the authority of the City Council to impose by ordinance further restrictions or limitations on the granting of any liquor license . . . . Except as herein provided; all such on-sale and off-sale liquor establishments shall continue to be subject to the pertinent statutes of the State of Minnesota and the City ordinances of the City of Minneapolis.

7. The Minneapolis City Charter, Chapter 4, Section 16, states:

Licenses May Be Revoked. Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license for the violation of the provisions of any law, ordinance or regulation relating to the exercise of any right granted by such license, the city council may revoke such license in addition to the penalties provided by law or by ordinance for any such violation.

8. The Minneapolis Code of Ordinances (MCO) § 259.250, contains the following provisions, among others, related to the minimum standards and conditions required to hold a license under Titles 10, 13, and 14 of the Minneapolis Code.<sup>95</sup> Failure to comply with any of these standards and conditions shall be adequate grounds for the denial, refusal to renew, revocation or suspension of the license:

- (1) It shall be the responsibility of the licensee to take appropriate action to prevent further violations following conduct by any persons on the business premises, including parking areas, in violation of any of the following statutes or ordinances:
  - . . . .
  - h. Minnesota Statutes, Section 609.72 and Section 385.90 of this Code, which prohibits disorderly conduct.
  - . . . .
  - j. Minnesota Statutes, Sections 609.74 and 609.745, which prohibit public nuisance and permitting a public nuisance.
  - . . . .
  - l. Any other criminal activity arising out of the conduct of the business.

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<sup>94</sup> Minn. R. 1400.7300, subp. 5.

<sup>95</sup> Title 14 of the Minneapolis Code, entitled "Liquor and Beer," sets forth the City's regulations for liquor licenses. See Minneapolis Code, Chapter 362.

- (2) It shall be the responsibility of the licensee to maintain and operate the business in compliance with all applicable laws and ordinances, including the zoning, fire, environmental health, environmental management, license, food, liquor, housing and building codes.
- (4) It shall be the responsibility of the licensee to provide adequate security to prevent criminal activity, loitering, lurking and disorderly conduct on the business premises, including parking areas.
- (9) The provisions of this section are not exclusive. Adverse license action may be based upon good cause as authorized by Chapter 4, Section 16 of the Charter. This section shall not preclude the enforcement of any other provisions of this Code or state and federal laws and regulations.

7. The Minneapolis Code of Ordinances provides that any liquor license may be revoked by the City Council for any violation of City Ordinance Chapter 362 or state law, or because “of the conduct of the business of the licensee.” A liquor license may also be revoked “as otherwise provided” by the City Code.<sup>96</sup>

8. Minn. Stat. § 340A.415 provides that a municipality may revoke a liquor license for any of five violations: 1) selling alcoholic beverages to another retail licensee for resale; 2) purchasing alcoholic beverages from another retail licensee for resale; 3) conducting or allowing unlawful gambling on licensed premises; 4) the failure to remove or dispose of alcoholic beverages pursuant to commissioner’s order; or 5) the failure to comply with an applicable statute, rule or ordinance relating to alcoholic beverages.

9. The City has the authority to revoke liquor licenses for the failure to comply with an applicable statute, rule or ordinance relating to alcoholic beverages. The City exercises that authority where, in the totality of the circumstances, the business cannot continue to operate within its license without engaging in ongoing violations of applicable statutes, rules, or ordinances.

10. The City License Division has not demonstrated that ENR’s ongoing operations constitute operation of a nightclub, as that term is described under the MCO.

11. The City License Division has not demonstrated by a preponderance of the evidence that good cause exists for the City to revoke ENR’s liquor license.

12. The City License Division has demonstrated that the imposition of a fine for the use of temporary bars is appropriate. The City License Division has demonstrated the 2:00 a.m. music ordinance was violated, but the fine for that conduct has already been paid. The City License Division has demonstrated that the imposition

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<sup>96</sup> Minneapolis Code of Ordinances § 362.340.

of conditions regarding a minimum number of seats and retention of earlier conditions on ENR's license are appropriate pursuant to Minneapolis Ordinance § 259.250(9).

13. To the extent that the following memorandum contains additional conclusions, they are hereby incorporated herein.

Based upon the above conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Minneapolis City Council not revoke the liquor license held by Midwest Latino Entertainment & Talent, Inc., and Maya Lopez-Santamaria d/b/a El Nuevo Rodeo. Should the Minneapolis City Council determine that some sanction is appropriate, the ALJ recommends that the Minneapolis City Council impose a fine for using temporary bars, and imposing the following conditions on the license: 1) discontinuing the use of temporary bars absent City License Division approval, 2) establishing an affirmative requirement that no fewer than 353 seats be available in the licensed premises when the main floor is in use, and 3) that the conditions established by agreement between ENR and the City License Division in September, 2008 remain in effect.

Dated: March 17, 2010

s/Raymond R. Krause  
RAYMOND R. KRAUSE  
Chief Administrative Law Judge

Reported: Digitally Recorded (No Transcript Prepared)

### **NOTICE**

This Report is a recommendation, not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendation. Pursuant to Minn. Stat. § 14.61, the City Council will not make its final decision until after it has provided each party adversely affected an opportunity to file exceptions and present argument to the Minneapolis City Council. Parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis, Minnesota 55415-1382; telephone number 612-673-3136, to find out the process for filing exceptions, or presenting argument.

The Minneapolis City Council is requested to serve notice of its final decision upon each party and the Administrative Law Judge by first-class mail.

## MEMORANDUM

### Background

In this proceeding, the City of Minneapolis seeks to revoke ENR's liquor license. There are two distinct categories of behavior that have been identified by the City License Division as reasons for taking adverse action. The behavior that has been identified as justifying revocation is the ongoing operation of ENR as a nightclub, rather than its licensed status as a restaurant. The other behavior is demonstrated violations of the Minneapolis Code of Ordinances regarding liquor licenses by ENR. The City License Division has acknowledged that the demonstrated violations of the MCO regarding ENR's liquor license do not rise to the level of violations that would justify revocation as a sanction.

### Initial Decision to License

ENR's business plan is not ambiguous regarding its planned operations. At the time of ENR's initial licensure, the Minneapolis City Council was aware of the floor plan of the premises that ENR was proposing to use and the manner in which the business would operate. The City License Division was fully aware of what those impacts would be since the prior tenant, Vanandy's Nightclub, had been operating from that location for over five years, with attendance at Vanandy's events regularly filling the available space.

The economic situation in the Longfellow neighborhood and in the vicinity of 27<sup>th</sup> and Lake specifically, was the subject of development efforts being supported by the City. Those development efforts included fostering responsible entertainment venues on Lake Street. By any measure, that effort has been a success. ENR has contributed to those development efforts by employing significant numbers of people, generating significant tax revenues, and maintaining extensive security measures. The City has obtained the benefits that it sought when ENR was granted its license to operate.

The consistent testimony of the City License Division witnesses was that the initial licensure of ENR as a restaurant, rather than a nightclub, was a "mistake." The City maintains that it is not estopped from correcting this "mistake."<sup>97</sup> The record in this proceeding demonstrates that there was no mistake made by the City. Rather, the City exercised a reasoned judgment to authorize ENR's business to be conducted from the licensed premises. There was full disclosure from Ms. Lopez-Santamaria regarding how ENR was to be run and what could be expected regarding attendance and the resulting neighborhood impacts; and ENR has been operating as it represented it would. ENR's operation is clearly different from the nightclub that previously operated from the same premises. ENR's proposed operations were determined to be compliant with applicable license and zoning regulations. The application of a different standard now by the City's inspectors does not change the propriety of the initial decision to issue ENR its license.

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<sup>97</sup> City Brief at 5.

## Licensing Authority

Municipal authorities have broad discretion within their geographical jurisdiction to determine the manner in which liquor licenses shall be issued, regulated and revoked.<sup>98</sup> In discussing the implied powers of a city to regulate the sale of liquor, the Minnesota Supreme Court has said,

The power to regulate the retail sale of alcohol and alcoholic beverages conferred upon the governing board of a city includes the power to prescribe such reasonable rules and impose such reasonable restrictions as to the manner and circumstances in which the business shall be conducted as will tend to promote order and protect the public from harm.<sup>99</sup>

The City License Division contends that revocation of ENR's license is appropriate because ENR is no longer operating as a restaurant, as required by the terms of its license. Minneapolis Ordinance 362.392 (a) sets out the standards for establishments such as ENR, whose entrances are less than 500 feet from residentially-zoned properties, as follows:

(1) The establishment shall maintain, on a monthly basis, gross sales revenue during each fiscal year from the sale of food and beverages not containing alcohol in an amount of not less than sixty (60) percent of its total gross revenue from the sale of food and beverages, except that a bowling center shall maintain such revenue in an amount not less than fifty (50) percent.

(2) No such premises shall contain a "bar area" except as permitted herein. A "bar area" shall mean any area not devoted exclusively to full restaurant service to customers seated at tables, in which consumption of alcoholic beverages is a substantial activity, except an area predominantly used as a holding area for customers waiting for restaurant seating. The size and capacity of such an area must bear a relationship to the size and capacity of the restaurant area which is consistent with its purpose as a waiting area. A waiting area of excessive size shall not be approved.

There is no dispute in this proceeding that ENR meets the 60 percent gross revenue requirement. The City License Division contends that any area not having seating is treated as a "bar area" for the purposes of this ordinance. From this reading, the City License Division contends that having removed some of the tables from the area adjacent to ENR's dance floor constitutes a violation of the prohibition against a "bar area" on ENR's premises. The City License Division cited no language in any other part of its ordinances in support of this contention regarding bar area.

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<sup>98</sup> *Bourbon Bar & Café Corp. v. City of St. Paul*, 466 N.W.2d 438, 440 (Minn. App. 1991), citing *Sabes v. City of Minneapolis*, 265 Minn. 166, 171, 120 N.W.2d 871, 875 (1963).

<sup>99</sup> *City of Duluth v. Cervený*, 218 Minn. 511, 516, 16 N.W.2d 779, 783 (1944).

The City License Division's reading of the ordinance bears no relation to the intent of the ordinance or its application to ENR at the time of the issuance of the license. The common practice in many restaurants is to have a bar area, just off of the main entrance, used as a waiting area while tables become available. This area "must bear a relationship to the size and capacity of the restaurant area." A dance floor is not a waiting area. The plain meaning of the ordinance does not allow for a dance floor to be treated as a "bar area."

The limitations on what constituted a "bar area" existed at the time ENR's license was issued. The business plan and floor plan provided with the application each indicated how the business would be operated. The ongoing operations of ENR have been consistent with its business plan. The changes to the seating arrangements did not substantially change the nature of the business conducted on ENR's premises from the time that the license was first issued.

Inspector Olds acknowledged that there is no effective definition of "nightclub" in the MCO.<sup>100</sup> As a substitute for a definition in the license ordinances, the City License Division relied on the Minneapolis ordinance on zoning uses, which states in pertinent part:

520.160. Definitions. Unless otherwise expressly stated, or unless the context clearly indicates a different meaning, the words and phrases in the following list of definitions shall, for the purposes of this zoning ordinance, have the meanings indicated. All words and phrases not defined shall have their common meaning.

\* \* \*

*Nightclub.* A use engaged in the sale of alcoholic beverages for consumption on the premises, including taverns, bars, cocktail lounges and similar uses, or a use other than a sit down restaurant which provides general entertainment.

The City License Division noted that "little food was being served" at the time that inspectors were present. ENR's testimony was un rebutted that its kitchen was open during those times. The City License Division has not suggested that it imposes any requirement that patrons order full meals after 10:00 p.m. There is no obligation under any of the ordinance provisions cited that full meals be ordered **at any time** to maintain operation as a restaurant. What ENR must do is meet the 60/40 standard and not maintain a "bar area" beyond what was approved in its business plan.

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<sup>100</sup> Test. of M. Olds.

Inspector Olds acknowledged that ENR was operating as it had when its license was first granted.<sup>101</sup> The City License Division itself had approved ENR's operations as appropriate for the zoning in place at the time the license was granted.<sup>102</sup>

Applying the plain meaning of the ordinance to the facts as developed in the record of this proceeding, ENR is licensed as a restaurant. ENR is in compliance with the 60/40 gross revenue standard. ENR provides general entertainment in conjunction with its overall operation (not as a primary function of its operation). The record in this proceeding shows that ENR falls within the category of "a sit down restaurant which provides general entertainment." For this reason, ENR does not meet the definition of a "nightclub" as set out in Minneapolis ordinance.

The City License Division also cited the development standards in MCO § 536.20, which states in pertinent part:

**536.20. Specific development standards.** The uses listed below are subject to the following specific development standards, in addition to all other applicable regulations:

\* \* \*

*Nightclub.*

(1) Where alcoholic beverages are served, the use shall comply with the requirements of Title 14, Liquor and Beer, of the Minneapolis Code of Ordinances and Chapter 4 of the Minneapolis City Charter.

(2) The premises, all adjacent streets, sidewalks and alleys, and all sidewalks and alleys within one hundred (100) feet shall be inspected regularly for purposes of removing any litter found thereon.

(3) Nightclubs established or expanded after the effective date of this ordinance shall be located at least five hundred (500) feet from a residence or office residence district boundary.

The foregoing language does not define "nightclub." MCO § 536.20 was in existence when ENR was first granted its license in 2003. The granting of ENR's license in 2003 constitutes a determination by the City Licensing Division that the operations defined in ENR's business plan did not meet the definition of "nightclub."

Inspector Casey asserted that the change in seating supported the conclusion that ENR was now operating as a nightclub. Inspector Casey indicated that the

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<sup>101</sup> Test. of M. Olds.

<sup>102</sup> *Id.*

standard was what was shown on the business plan and any variance from that plan needed to be authorized by the City License Division.<sup>103</sup>

The floor plan for the ground floor submitted by ENR at the time of the application shows seating for 14 persons at the bar and 80 restaurant seats, totaling 94 seats.<sup>104</sup> The City License Division (as set out in Findings 7 and 10 above) authorized a “seating capacity” on the ground floor of 94, which matches the number on the floor plan. The City License Division described the authorized seating as consisting of 77 seats at tables and a bar with 12 seats. Those numbers total 89.

At the time of initial licensure, the City License Division described the seating of the main floor as restaurant seating for 64 persons at tables and chairs, an oval-shaped bar with seating for 23 persons, a bar with seating for 17 persons, and additional seating for 160 persons at tables and chairs. In addition to describing the two bar areas, the City License Division noted that a stage and dance floor were present on the main floor. The City License Division’s description of the seating present on the main floor totals 264.<sup>105</sup>

The total number of seats described by the City License Division at the time of ENR’s application for licensure was 353 (89 lower floor, 264 main floor). Adjusting for the lower floor total number (94) mentioned by the City License Division, this total rises to 358. In the application assessment document, the City License Division described the total seating capacity as being 573 persons.<sup>106</sup> The total number of seats as shown on the floor plans for the lower floor and the main floor totals 415.

There is no evidence in this record to show that ENR ever had seats for 573 persons on its licensed premises. The description of “seating capacity” is, under the circumstances present in this proceeding, an upper limit only. This conclusion is supported by testimony from Deputy Director Cervantes. There is no evidence to support a conclusion that the City License Division expected ENR to provide seating for 573 persons in its ongoing business operations when ENR was initially licensed.

Inspector Casey indicated that the City License Division’s standard was for a business to operate as described in its business plan at the time of the application, as limited by the terms of the license issued. Any significant changes would require approval by the City License Division.<sup>107</sup> Regarding ENR’s seating, the observed number of seats on April 16, 2008 was 341.<sup>108</sup> While this number is below the total of 353 City License Division-described seats, the margin is not exceptional considering the overall size of ENR’s premises.

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<sup>103</sup> Test. of J. Casey.

<sup>104</sup> Ex. P57.2

<sup>105</sup> Ex. R-4.

<sup>106</sup> *Id.*

<sup>107</sup> Test. of J. Casey.

<sup>108</sup> The total of observed seats comes from the copy of the floor plans in the record as P57.1 and P57.2. While P57.1 notes the total R-4.



The record in this matter shows that the number of seats present in ENR does not constitute a basis for sanctioning ENR's license. The City may choose to make the availability of 353 seats, while the main floor is in use, a condition for continued licensure.

The City License Division contends that the Licensee's agreement to stop "operating as a nightclub" as part of the December 11, 2006 settlement conference imposed some sort of obligation on ENR.<sup>109</sup> The record in this proceeding shows that the City License Division has proceeded under a mistaken conclusion that ENR has been operating as a nightclub. ENR has been in compliance with the December 11, 2006, settlement conference agreement by operating in accordance with its business plan. There is no condition placed on ENR's license by that settlement agreement that did not already exist in the license as issued.

### Other Conduct Cited

The City License Division relied on an alleged failure by ENR to obtain a building permit for construction that occurred in December 2008, as a basis for sanctioning ENR's liquor license. The City Inspector contended that ENR was responsible for obtaining the permit simply because Ms. Lopez-Santamaria had said she was.<sup>110</sup> Inspector Casey maintained that the responsible party for obtaining the permit varies depending on who is doing the work. The City License Division cited no MCO provisions in support of this contention.<sup>111</sup> Minneapolis ordinances are clear, however, that the lessee is not responsible for the permits but rather the building owner is responsible.

MCO 87.90(f) authorizes the City's building authority to require the "owner, agent, occupant or person in charge or control of the building involved, or the contractor constructing or altering the building involved" to bring a noncompliant property into compliance with the building code. But the following provision states:

(g) For the purposes of this subsection, the word "owner" is defined to mean any of the following: The fee owner of record as recorded in the office of the register of deeds or the registrar of titles for Hennepin County; the present owner according to the tax records of the Hennepin County Tax Department; the owner as filed with the department of inspections for the City of Minneapolis, according to Chapter 244 herein; a contract vendor under a contract for deed, or a contract vendee under a contract for deed. **The owner, or owners, shall be responsible for compliance**

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<sup>109</sup> City Brief, at 5 (citing *Amina, Inc. v. City of Minneapolis*, 2008 WL 223250 (Minn. App. 2008).

<sup>110</sup> Test. of J. Casey

<sup>111</sup> The ALJ notes that throughout MCO Chapter 87, the "owner" is the party with authority to obtain a certificate of code compliance or seek relief from the Building Code Board of Appeals. The MCO provisions on permits, Chapter 89, makes no mention of lessees obtaining permits, only owners and owner-occupants. There may be a practice on the part of the City permitting process to allow contractors or lessees to obtain building permits, but such a practice does not change the standards set out in the MCO.

**with all orders issued against their property and within the time period as set out in such orders, where proper notice has been given such owner.** Such notice shall be deemed sufficient and proper when sent via prepaid, first-class postage to such owner or owners at their last known address or their address as shown on such recordations. This subsection shall be effective against any contracts or conveyances entered into after August 19, 1978. (Code 1960, As Amend., § 10.200; Ord. of 9-27-74, § 2; 78-Or-143, § 1, 8-11-78; Pet. No. 251752, § 1, 3-16-90)<sup>112</sup>

ENR was not ordered to bring a condition into compliance. Rather, the construction was identified as unpermitted. Under MCO 87.90(g), the building owner, not ENR, was responsible for obtaining the permit. ENR's status as a volunteer in obtaining the permit does not constitute a basis for sanctioning ENR's liquor license.

As a further ground for revocation, the City License Division cited ENR's delinquency in paying overdue false alarm fines. This is a de minimis violation and the fines have been paid. This is not a valid basis for revoking ENR's license.

The City License Division has demonstrated three de minimus violations of MCO § 360.72 (f) on October 28 and November 28, 2008, and October 3, 2009 when music continued until 2:05 a.m. Modest sanctions are appropriate for these violations, and any associated fine has already been paid. ENR has a policy to terminate its live music approximately 15 minutes before the 2:00 a.m. deadline. This policy failed once in the past year to stop the music on time. Revocation of ENR's license for these violations is a disproportionate sanction as these violations do not constitute "good cause."

ENR has paid the fines associated with the music violations issued in October and November, 2008. The City License Division had not informed ENR of the decision arrived at by Director Forte on November 21, 2008 (and before the required nexus between any incidents and ENR had been determined), that ENR's license was to be revoked.<sup>113</sup> Had ENR been informed of that decision, ENR would have been able to contest those citations as part of this proceeding. As discussed in other parts of this Memorandum, the violations underlying these citations do not support revocation of ENR's license.<sup>114</sup>

The City License Division contended that "Evidence of an inordinately high number of incidents of criminal behavior on the licensed premises was admitted into evidence during the course of the hearing in the form of official police reports."<sup>115</sup> This contention was refuted by the testimony of the MPD officers who work off-duty in ENR. The number and seriousness of incidents of criminal behavior around ENR are 1) less than that of adjacent areas in the same neighborhood, 2) largely occurring from September through December 2008 as a result of instituting stricter standards in ENR,

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<sup>112</sup> MCO 87.90(g) (emphasis added).

<sup>113</sup> Ex. R-35.

<sup>114</sup> Test. of M. Santamaria.

<sup>115</sup> City Brief at 3.

and 3) drastically reduced in the period from December 2008 to the present. While the City Licensing Division has sought to attribute the demonstrated reduction in criminal activity to the current economic recession or the existence of this proceeding, the evidence in the record supports the conclusion that the reduction is due to effective security measures implemented by ENR. Furthermore, the suggestion by the Licensing Division that ENR might relocate to the downtown area belies its current contention that it is a poorly managed, troubled enterprise.

Revocation of a license issued by the City is authorized by the City Charter, which states in pertinent part:

Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause. Minneapolis, Minn., City Charter ch. 4 § 16 (2001).

The standards governing the use of the MCO provision regarding “good cause” in sanctioning a licensee were addressed recently by the Minnesota Court of Appeals, which stated:

To satisfy the Due Process Clause, a city ordinance permitting adverse action against a liquor license must provide sufficient objective standards to control the discretion of the governing authority and must give adequate notice to the licensee of the criteria used to permit adverse action against the license. See 45 Am. Jur. 2d Intoxicating Liquors § 151 (2007) (citing *Folsom v. City of Jasper*, 279 Ga. 260, 612 S.E.2d 287 (2005) (holding due process rights violated where city council had discretion to determine both whether a violation of law had occurred and that such violation constituted grounds to suspend or revoke the license)).<sup>116</sup>

The City License Division has not shown that the conditions regarding the current operation of ENR vary in any significant degree from the business plan as set out in ENR’s initial application for licensure. Inspector Casey’s testimony made clear that the decision to seek revocation of ENR’s license for operation as a nightclub was based on the erroneous belief that ENR’s current operation somehow differed from the conditions set out in ENR’s business plan and the application that was approved. Inspector Olds acknowledged that ENR was operating in the same fashion that was originally approved by the Minneapolis City Council when ENR’s license was granted. The City License Division has not shown good cause to revoke ENR’s license on the basis that it is operating as a nightclub or as a result of minor miscellaneous infractions.

## **Revocation and Lesser Sanctions**

While the City has broad authority regarding sanctions when taking adverse action against a liquor license, the record in this proceeding demonstrates that

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<sup>116</sup> *ITMO On-Sale Liquor License, Class B, Held by T. J. Management of Minneapolis d/b/a Gabby’s Saloon and Eatery*, A08-0681 (Minn. App. March 31, 2009) (*Gabby’s*).

revocation is too severe for the few violations relating to ENR's liquor license. The City License Division's witness acknowledged this to be the case.<sup>117</sup> Further, ENR's record of compliance since December 2008, has been exemplary, with only one violation of the 2:00 a.m. music restriction having occurred.

As the Minnesota Court of Appeals has held:

When local governmental units exercise their licensing authority, especially in connection with the sale of liquor, they must determine whether continued operations will be 'detrimental to the public good.' *Sabes v. City of Minneapolis*, 265 Minn. 166, 171, 120 N.W.2d 871, 875 (1963) (footnote omitted) (describing judicial deference to discretion of city council determining whether to revoke liquor licenses).<sup>118</sup>

The record in this matter, particularly the testimony of MPD officers with knowledge of the situation in the immediate environs of ENR, demonstrates that ENR's operations are not a cause of problems in the neighborhood.<sup>119</sup> There is ample evidence in the record to show that the continued operation of ENR is a positive benefit to the community. Under the holding in *Diva's*, the presence of a positive benefit to the public good should weigh in the decision regarding sanctions, particularly revocation.

An adequate evidentiary basis for revocation of a business license was described by the Minnesota Court of Appeals as follows:

Our exhaustive review of the record indicates that there was substantial evidence that relator did not abide by the voluntary operating conditions, considerable criminal activity occurred in the area directly surrounding relator's store, and relator violated provisions of the MCO. Further, both the ALJ and the committee recommended that respondent revoke relator's licenses. The committee found that relator's store was 'poorly-managed,' 'had a deleterious impact upon the community,' and consumed 'a disproportionate and unreasonable amount of City enforcement and regulatory resources.' The committee also found that while relator took some steps to address the problems related to criminal activity occurring around the store, the 'lengthy negative impact upon the community and

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<sup>117</sup> Test. of R. Cervantes.

<sup>118</sup> *DRJ, Inc., d/b/a Diva's Overtime Lounge v. City of St. Paul*, A07-1599 (Minn. App. November 13, 2007)(*Diva's*).

<sup>119</sup> By way of contrast, clear issues were demonstrated in a license matter regarding a different licensee in the same building. In support of its arguments, the City cited *ITMO the Applications for Class B and Class E Licenses of Baku Entertainment & Restaurants, LLC and Fatemeh Engen*, OAH Docket No. 8-6010-19615-6 (Findings of Fact, Conclusions and Recommendation issued March 3, 2009) (*Baku*). In *Baku*, a licensee used the third floor of the Oddfellows Building (of which ENR is on the first and second floors) to offer musical entertainment with no food sales and significant beer and wine sales. On October 13, 2007, continuing into the early morning of October 14, 2007, that licensee conducted an event that devolved into a near-riot. No such behavior by ENR's patrons has been alleged in this proceeding. There are distinct differences in the operation of the licensee in *Baku* and that of ENR. The comparison supports the conclusion that ENR is operating within its authorized business plan.

upon City resources' outweighed any mitigating efforts presented by relator. These findings are supported by evidence in the record. See *CUP Foods*, 633 N.W.2d at 564 (holding that, while the evidence was 'hardly overwhelming,' there was substantial evidence to reasonably support respondent's decision to revoke relator's business license).<sup>120</sup>

In this matter, the evidentiary record shows that ENR has abided by the voluntary conditions on its license, making extraordinary expenditures to do so. The behavior cited as criminal activity in the area of ENR has primarily arisen as ENR security has put in place stringent policies as requested by the City License Division. Since that period of adjustment, the number and severity of incidents has fallen dramatically.

The record in this matter shows that ENR is well-managed and responsive to issues raised by the City License Division. The substantial security in place at ENR has significantly reduced the burden of the cost of police protection on the City. While City resources have been expended in this proceeding, that has been primarily driven by the mistaken conclusion that ENR's licensed operation, as originally approved by the City License Division, was improperly authorized or has somehow changed. That expenditure of City resources on this issue cannot be considered in any way chargeable to ENR.

The record is essentially un rebutted that ENR has taken effective steps to address problems related to criminal activity in the vicinity of the business premises and the parking area rented by ENR. The record is also clear that ENR's positive benefit to the community far outweighs the relatively few problems that have been associated with patrons leaving ENR.

Applying the *Amina* factors to the record in this proceeding supports the conclusion that the City License Division has not shown good cause to revoke ENR's business licenses. The ALJ respectfully recommends that the City impose appropriate conditions on the license to address the demonstrated violation, operation of a temporary bar that was not described in ENR's business plan. These mobile bars do nothing to alter the proportion of food to alcohol nor do they change the approved floor plan. They should, however, be explicitly approved by the Licensing Division before use.

Under the holding in *Gabby's*, *supra*, conditions imposed cannot extend to "livability issues" off of the premises of ENR without a demonstration of a nexus between those issues and violations of the MCO regarding liquor licenses. As discussed above, the required nexus has not been shown by the record in this proceeding.

The City License Division has shown that violations of the MCO regarding liquor licenses have occurred and that lesser sanctions than revocation are appropriate. The record in this proceeding supports the imposition of a fine for music continuing past

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<sup>120</sup> *Amina, Inc, supra*.

2:00 a.m. (which has already been paid), a fine for using temporary bars, discontinuing the use of such bars in the future absent City License Division approval, establishing an affirmative requirement that no fewer than 353 seats be available in the licensed premises when the main floor is in use, and a continuation of the conditions established by agreement between ENR and the City License Division in September 2008.

**R. R. K.**